Supreme Court, U.S.
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No. 84-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,
Petitioner,
v.
DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,
Respondents,
and
CITICORP (USA), INC.,
Respondent-Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER DEAK-PERERA HAWAII, INC.

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The State of Hawaii contends that the Department of Transportation ("DOT") *is* the sovereign. Its premise is that the DOT is the ultimate policy-making authority in Hawaii in regulating competition at the airport.

That premise is thoroughly unsound. The Hawaii Constitution neither creates, nor references, much less vests such authority in, a department of transportation. The sovereign in this area is the Legislature, which created and empowered the DOT. That the Legislature is the

ultimate authority in this area is evident in the fact that it has required the DOT to conform to federal and state laws [1] and specifically has authorized the DOT to enter into an exclusive contract at the airport in violation of those laws in but one line of commerce.[2]

Sovereign immunity can be conferred on the DOT in this case only upon further analysis, pursuant to tests pronounced by this Court. Yet the lower courts have foregone this analysis.

If the decision of the Ninth Circuit is allowed to stand, the intercircuit conflicts on the state action doctrine will surely be compounded. Most important, the decision encourages dislocation of competition by state functionaries acting at their own direction, which thereby raises doubts about the continuing vitality of this Court's *Midcal* [3] test and recent state action decisions.

Respectfully submitted,

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[1] *See* HAWAII REV. STAT. § 261-9 (App. 41a) *and* § 261-12(c) (App. 43a).

[2] *See* Act 90, 1982 Hawaii Sess. Laws (App. 48a), codified in HAWAII REV. STAT. § 261-7, as amended.

[3] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).